



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 326 OF 2017

ZIPPORAH WANJIKU KARIUKI.....PLAINTIFF

VERSUS

PROGRESSIVE CREDIT LTD.....1ST DEFENDANT

CARNELIAN ENTERPRISES AUCTIONEERS.....2ND DEFENDANT

GEORGE NJUGUNA NJOROGE.....3RD DEFENDANT

JUDGMENT

By a Plaint dated **13th March 2017**, the Plaintiff filed this suit against the Defendants and sought for orders that ;

- a) A Declaration that parcel of land number Muguga/Gitaru/3112 belongs to the Plaintiff and the charge created over parcel No. Muguga/Gitaru/3112, in favour of the 1st Defendant is invalid.***
- b) An order directing the District Land Registrar, Kiambu to cancel the registration of the 3rd Defendant as proprietor of Muguga/Gitaru/3112, and register the said property in the name of the Plaintiff.***
- c) An injunction restraining the 1st and 2nd Defendants, their agents, servants, employees, officers and or any other person acting on their instructions, control and directions from auctioning, selling, transferring, alienating or in any other manner whatsoever from disposing parcel No. Muguga/Gitaru/3112.***
- d) Costs of this suit and interest thereon.***
- e) Any other relief.***

In her statement of Claim, the Plaintiff averred that she is the registered owner of the suit property. That she has constructed a residential house on the suit property which is her matrimonial home and she resides there with her children. Further that she learnt that the 1st Defendant illegally and irregularly used the said matrimonial home as collateral for a loan allegedly advanced to the 3rd Defendant, which information came to her knowledge after documents addressed to the 3rd Defendant, were dropped at her house and the property advertised for sale on **27th January 2017**.

That the documents state that the suit property was for sale on **3rd April 2017**, for monies owed to the 1st Defendant by the 3rd Defendant. That she had given the house documents to the 3rd Defendant as security for a separate loan that she had taken from him and at no time had she effected the transfer. That any charge created over the suit property is unlawful and invalid as the same was done without her knowledge and consent. She particularized fraud by the 3rd Defendant; as purporting to transfer the suit property to himself and obtaining the title deed without her consent.

She further averred that before advancing any monies to the 3rd Defendant, the 1st Defendant ought to have done due diligence on the suit property which would have revealed that she occupied the suit property, and that 3rd Defendant does not reside on the suit property and that the Plaintiff was at all times the legal owner. That the charge was created in breach of the law. That she has never been served with statutory notice and there are other properties registered in the 3rd Defendant's name which have more value than the 1st Defendant is demanding and the 3rd Defendant is capable of repaying the said amount.

The suit is contested and the 1st and 2nd Defendants filed a statement of Defense dated **8th June 2018**, and denied all the allegations made in the Plaintiff. They averred that the title in respect of the suit property bear the name of the 3rd Defendant as the legal proprietor and further affirmed upon conducting a search, that on or about **January 2015**, the 3rd Defendant approached the financier for a loan facility of **Kshs. 5,000,000/=** which was to be secured in the nature of a charge over **Title No. Dagoretti/Kinoo 5956, and Muguga / Jet Scheme /4168 and Muguga / Gitaru / 3112**. That they conducted due diligence before disbursing the funds, under the facility and confirmed the authenticity of the document. That upon successful registration of the charge, the 1st Defendant conducted a post registration charge and obtained a copy of the green card, which revealed that the 3rd Defendant was the registered owner of the suit property. That the 3rd Defendant is in breach of the letter of offer and reneged on the loan repayment and despite numerous notices, he is in default and as a consequence thereof, the 1st Defendant moved to exercise its Statutory Power of Sale. That they instructed the 2nd Defendant to issue requisite **notices** and proceed to advertise the suit property for sale. That they were not obligated to serve any **statutory notices** to the Plaintiff, save for the auctioneers notice of sale which was affixed in the suit property.

Despite service of Summons to Enter Appearance, the 3rd Defendant did not **Enter Appearance** nor participate in the Court proceedings. The matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and the 1st & 2nd Defendants equally called one witness and closed their case

PLAINTIFF'S CASE

PW1 Zipporah Wanjiku Kariuki adopted her witness statement as her evidence in Court. She further produced her list of documents as Exhibit 1. She denied selling the suit property to **George** nor defaulting in the payment of her loan. That she had taken a loan of **Kshs. 595,700/=** from **George** and she had paid **Kshs.1119,000/=** but he still sold her land. She denied receiving **Kshs.1,600,000/=** and that the loan plus interest was coming to **Kshs. 800,000/=**. That the loan agreement dated **12th November 2015**, stated that she had transferred title to the lender, with her full knowledge but that the same was to be transferred back to her after clearing the loan..

That the signature at the 2nd portion is not hers. Further that she was given money by **George**, but she did not transfer the land to him. That she signed the transfer, but it was not dated and she was not aware of the LCB consent. The letter of consent is dated **October 2016**. That she had an agreement with **George**, and the transfer was done on the next date being **13th November 2015**, and consent was dated **11th October 2015**. She further testified that she had not taken any loan from **George** in **2015**. That she gave **George** the title deed as collateral for the loan. Further that she met **George** on **12th November 2015**, and he told her that if she did not pay **Kshs.320,000/=**, she was to transfer land back to him. That she learnt of the transfer after the auctioneers landed and she was not given enough notice for the sale.

DEFENCE CASE

DW1 Betty Mwongela testified that she worked for **Progressive Credit Limited**, 1st Defendant herein and she adopted her witness statement dated **8th June 2018**. She produced the list of documents dated **8th June 2018**, as Exhibit 1 and urged the Court to dismiss the suit.

She further testified that **George** was their client and he made an Application for a loan in **2012**, and secured the loan using various properties. That the facility was approved around **June 2015**, and the amount of money approved was **Kshs. 3, 191,702/=**. That the security was two properties and a Motor Vehicle which the said **George** substituted with **Muguga/Gitaru/3112**, upon being satisfied that he was the owner of the suit property.

That she came to learn of the loan agreement when the case was filed. That the Loan between **Zipporah** and **George** was taken on **12th November 2015**, and they had approved **George's** loan by then. That there is a consent used to transfer the land from **Zipporah** to **George** and it is dated **1st October 2015**, and there was no relationship between **George** and **Zipporah** before **12th November 2015**. That they charged the property for **Kshs. 5,000,000/=** which was **George's** Limit. That they did not overcharge the property and there was no valuation done over the property. That between the time of offering the loan to **George** and the time of transfer, it was about 6 months. That for **Zipporah**, the transfer was only a day. That the charge document is dated **January 2016**, and **George** signed it on a date given nor is the execution date shown. Further that the spousal consent by **George** is not dated and it was registered on **12th January 2016**, and then **George** came in to substitute it after it had been charged. That it was not their obligation to date the charge document. That the account has not been cleared.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the provisions of law and renders itself as follows;

It is not in doubt that the Plaintiff was the registered owner of the suit property before the same was transferred to the 3rd Defendant. It is further not in doubt that the suit property is now charged to the 1st Defendant by the 3rd Defendant as security of a loan facility that was granted to the 3rd Defendant. It is also further not in doubt that the 3rd Defendant has defaulted in the repayment of the said loan and the 1st Defendant has sought to exercise its **statutory power of sale**. It is further not in doubt that the Plaintiff and the 3rd Defendant entered into an agreement that the 3rd Defendant would loan the Plaintiff some money and use the suit property as security. It is the Plaintiff's contention that she never sold the suit property to the 3rd Defendant and that the 3rd Defendant fraudulently transferred the said property to himself and used it to secure the loan with the 1st Defendant and therefore the charge created is illegal and unlawful.

The above being the facts of the case, the Court therefore finds and holds that the issues for determination are;

1. Was the transfer of the suit property to the 3rd Defendant fraudulent.

2. Is the Plaintiff entitled to the prayers sought

3. Who should bear the costs of the suit

1. Was the transfer of the suit property to the 3rd Defendant fraudulent.

It is not in doubt that the suit property was transferred and a title deed issued over the suit property to the 3rd Defendant on **13th November 2015**. It is the Plaintiff's contention that the suit property was transferred fraudulently to the 3rd Defendant as she never entered into any sale agreement over the transfer of the same nor did she authorize the transfer of the same.

According to the *Black's Law Dictionary, 10th Edition*, fraud is defined as follows;

“A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment.”

The basis upon which the 3rd Defendant transferred the suit property to himself is the agreement dated **12th November 2015**, entered into between the Plaintiff and himself. Though the Plaintiff testified that she did not sign the second part of the said agreement, the Court concurs with the 1st & 2nd Defendant's submission that the Plaintiff cannot disown a document she herself produced in evidence. The Plaintiff produced in evidence the loan agreement dated **12th November 2015**. Indeed in the said agreement, the suit property was to secure the amounts loaned to the Plaintiff by the 3rd Defendant. However, there is additional notes to the said agreement that state that the suit property was transferred to the 3rd Defendant with the knowledge of the Plaintiff. Further the notes which form part of the agreement states that the borrower who in the said agreement is the Plaintiff agrees that the lender, the 3rd Defendant herein would use the said security to secure a loan in a bank.

The Plaintiff in her submissions has further admitted that she signed the transfer documents, consent and left the 3rd Defendant with her documents that were necessary to effect the transfer. As already noted by the Court, fraud consists of misrepresentation or concealment of facts. The Plaintiff as per the evidence adduced was aware that the suit property was to be transferred to the 3rd Defendant and she allowed the 3rd Defendant to use the same as security for a loan.

Fraud is a serious offence, it must be specifically pleaded and proved. There is no evidence that the suit property was transferred to the 3rd Defendant by way of fraud as the Plaintiff okayed the said transfer. This court therefore finds and holds that the Plaintiff has not proved any **fraud** on the part of the 3rd Defendant, in so far as the same relates to the transfer of the suit property to him. While the Court acknowledges that it may be suspicious that the time within which the transfer was effected to the 3rd Defendant was done promptly, but the Court cannot hold that the said act in itself constitutes fraud.

As the 3rd Defendant had the authority of the Plaintiff to transfer the suit property to himself and further being that the Plaintiff herself gave the documents for completion to the 3rd Defendant, the Court finds no misrepresentation nor concealment of facts in the transfer of the suit property. Therefore, this Court finds and holds that the transfer of the suit property to the 3rd Defendant was legitimate and therefore lawful.

2. Is the Plaintiff entitled to the prayers sought

The Plaintiff sought for various orders amongst them a Declaration that the transfer of the suit property to the 3rd Defendant was invalid. The Court having held that the transfer was **not fraudulent**, finds and holds that the said prayer is not merited.

The Plaintiff has further sought for an order directing the cancellation of the title deed held by the 3rd Defendant and an order of injunction against the 1st and 2nd Defendants. It is not in doubt that the suit property has been charged in favour of the 1st Defendant. It therefore follows that the 1st Defendant has an interest over the said suit property. For the Court to give an order for cancellation of the title, it would be discharging the charge that is in favour of the 1st Defendant. As per the loan agreement produced in evidence, the Plaintiff authorized the 3rd Defendant to take a loan and use the suit property as security. The suit property was used to secure a loan and the same charged in favour of the 1st Defendant. Therefore, the Court finds and holds that the Order for a permanent injunction cannot be granted as against the Defendants as they have rights over the said property.

While the Court is sympathetic to the Plaintiff who claims to have paid all the amount owed to the 3rd Defendant, it is quite clear that the Plaintiff enabled the 3rd Defendant and no amount of due diligence would have led the 1st Defendant to find otherwise as the Plaintiff had allowed the transfer and taking of the loan. It would only have been proper for the Plaintiff to have legally sought for the revocation of the title held by the 3rd Defendant which did not happen

The transfer of the suit property to 3rd Defendant has been held to be valid. The registration of a person as the proprietor of a property grants the said person absolute and indefeasible rights and privileges appurtenant thereto. Thus, the Court finds and holds that the Plaintiff is not entitled to the orders sought.

3. Who should bear the costs of the suit

Section 27 of the Civil Procedure Act gives the Court discretion to award cost. Though costs usually follow the event, there are instances

in which the Court can exercise its discretion where special circumstances present itself. In the instant circumstances, the Court finds that it will be in the interest of justice for each party to bear its own costs of the suit.

Having now carefully read and considered the Pleadings by the parties, the evidence adduced and the relevant provisions of law, the Court finds and holds that the plaintiff has not proved her case on the required standard of balance of probabilities.

For the above reasons, the Court finds that she is not entitled to the prayers sought in her Plaint dated **13th March 2017**.

Consequently, the suit is dismissed entirely with an order that each party should bear its own costs of the suit.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy